Supreme Court, U.S.
FILED
JAN 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-975

IN THE

Supreme Court of the United States

October Term, 1989

ABID A. AL-MARAYATI,
Petitioner,

vs.

THE UNIVERSITY OF TOLEDO, GLEN DRISCOLL, KARL VEZNER and SHARRON E. DOERNER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the court below's affirmance of the district court's denial of Petitioner's motion for leave to amend his complaint provides a sufficient basis for review by this Court.

2. Whether the court below's affirmance of the district court's decision that the Petitioner's reprimand was not in retaliation for the exercise of his Title VII rights provides a sufficient basis for review by this Court.

TABLE OF CONTENTS

RESTATEMENT OF THE QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 3

RESTATEMENT OF THE CASE 4

REASONS WHY THE PETITION SHOULD BE DENIED 7

I. THE DENIAL BY THE DISTRICT COURT AND THE AFFIRMANCE BY THE SIXTH CIRCUIT OF PETITIONER'S FIRST MOTION FOR LEAVE TO AMEND COMPLAINT PROVIDE NO BASIS FOR REVIEW BY THIS COURT 8

II. THE CONCLUSION OF THE DISTRICT COURT THAT PETITIONER'S REPRIMAND WAS NOT RETALIATORY AND THE SIXTH CIRCUIT'S AFFIRMANCE PROVIDE NO BASIS FOR REVIEW BY THIS COURT 17

CONCLUSION 18

TABLE OF AUTHORITIES

Cases:

Baker v. City of Detroit, 458 F. Supp. 379, 381 (E.D. Mich. 1978), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878, *reh. en banc denied and vacated and remanded in part on other grounds*, 712 F.2d 222 (6th Cir. 1983) 11

Browning v. Pendleton, 869 F.2d 989 (6th Cir. 1989) 15,16

Edelman v. Jordan, 415 U.S. 651, 673, 94 S. Ct. 1347, 39 L. Ed. 2d 622 (1974) 14

Hall v. Medical College of Ohio, 472 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113, 83 L. Ed. 2d 789, 105 S. Ct. 796 (1985) 14

Marx v. Centran Corp., 747 F.2d 1536 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125, 105 S. Ct. 2656, 86 L. Ed. 2d 273 (1985) 9

Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174, 106 S. Ct. 2902, 90 L. Ed. 2d 988, *reh. denied*, 478 U.S. 1031, 107 S. Ct. 12, 92 L. Ed. 2d 767 (1986) 11,15

NCAA v. Board of Regents, 468 U.S. 85, 98 & n.15, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) 17

Ohio v. Madeline Marie Nursing Homes #1 and #2, 694 F.2d 449 (6th Cir. 1982) 15

Owens v. Okure, 488 U.S. _____, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989) 15,16

Will v. Michigan Dept. of State Police, _____ U.S. _____, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) 14

Wilson v. Garcia, 471 U.S. 261, 278, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985) 16

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77, *reh. denied*, 401 U.S. 1015, 91 S. Ct. 1247, 28 L. Ed. 2d 552 (1971) 9

Constitution:

U.S. Const. amend. 11 11,12,14

Federal Statutes:

42 U.S.C. §2000e *et seq.* 3,5,6,8,9,10,13,15,17

42 U.S.C. §1983 3,6,8,9,10,11,12,13,14,15,16

Rules of Procedure:

Fed. R. Civ. P. 15(a) 9

Fed. R. Civ. P. 39(b) 11

Ohio Statutes:

Ohio Revised Code §2305.09 16

Ohio Revised Code §2305.10 3,15,16

Ohio Revised Code §4112.01 *et seq.* 14

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Respondents do not contest the statement of opinions of the United States District Court for the Northern District of Ohio and of the United States Court of Appeals for the Sixth Circuit set forth in the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Respondents do not contest the statement of jurisdictional grounds set forth in the Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

The Respondents agree that the following statutory provisions, as set forth at Petitioner's Appendix A57, 59-60, are applicable to this Petition for Writ of Certiorari: 42 U.S.C. §2000e-3(A); 42 U.S.C. §1983; and Ohio Rev. Code Ann. §2305.10. Respondents dispute, however, the applicability of the remaining statutory provisions cited therein.

RESTATEMENT OF THE CASE

Professor Al-Marayati has been unhappy at the University almost from the date of his arrival in 1968 as an associate professor. He filed his first grievance with the Faculty Conference Committee ("FCC"), the elected peer-review advisory body to the President on all personnel and policy matters affecting faculty, in 1972. This grievance was the first of a steady stream of complaints filed with various bodies, including the Advisory Committee on Academic Personnel ("ACAP") and the FCC stemming from what he believed was his low entry-level salary. Grievances followed in 1980, 1982 and another in 1983. In the interim, Al-Marayati raised the issue of his merit increases in various letters and memoranda to then-President Driscoll. Not one body at the University ever found merit to any of the grievances.

Driscoll corresponded with Petitioner on a number of occasions and, in August 1982, reminded Al-Marayati to raise complaints in accordance with University policy before turning to him. In November 1983, Driscoll received a memorandum from the FCC regarding Petitioner's fourth grievance and containing the FCC's recommendation. Driscoll then warned Petitioner of the deleterious effects of his "ongoing stream of complaining memos" and informed Al-Marayati that he had exhausted all remedies at the University, that he should seek future redress in the courts, and that, if Petitioner did not refrain from raising old grievances, Driscoll would request the Board of Trustees to approve disciplinary action against Al-Marayati.

It was the Political Science Department, however, that bore the daily brunt of Al-Marayati's dissatisfaction. In early 1984, the department executive committee investigated nine of Al-Marayati's multi-page

memoranda regarding various departmental matters, concluding they were meritless. In January 1984, the department resolved that it would pursue disciplinary action at the college and university levels if Petitioner did not discontinue the constant flow of memoranda. About this time, Doerner was unanimously recommended to the rank of full professor by the chairman and department committee. Al-Marayati did not attend the department meeting, nor did he submit an absentee ballot; instead he objected to the promotion by memorandum to ACAP, contrary to the established promotion process. The department's request that Al-Marayati be officially reprimanded for having renewed old criticisms of Doerner, after being presented at the appropriate levels within the University, resulted in Driscoll's decision to officially reprimand Al-Marayati. In correspondence dated December 21, 1984, Driscoll informed Petitioner that he viewed the substance of Al-Marayati's memoranda to ACAP objecting to Doerner's promotion as an effort to renew old grievances and reminded Petitioner that he had been warned on two prior occasions to refrain from plowing the same ground. Driscoll also encouraged Petitioner to seek outside avenues of review (such as with the Ohio Civil Rights Commission, with which Petitioner had filed a charge of discrimination on December 14, 1984), instructed Petitioner to cease attempts to use the University's internal grievance mechanisms to resolve old grievances, and characterized the letter as an "official reprimand."

Petitioner filed his original complaint in the case on May 17, 1985. Respondents filed a motion to dismiss, which the district court granted, ordering that all acts of discrimination which occurred outside the 300-day Title VII filing period were time-barred, but, where relevant, could be used as background for the timely

discrimination charges. (Petitioner's App. G.) Petitioner's first counsel withdrew, and his second counsel filed a motion for leave to amend the complaint to substitute 42 U.S.C. §1983 for the Title VII claim on May 11, 1987. This motion was denied on August 5, 1987. Petitioner's second attorney then withdrew, and his third attorney filed a second motion for leave to amend to add claims under 42 U.S.C. §§1981 and 1985 on November 6, 1987. This motion was also denied.

A non-jury trial was conducted over a ten-day period. Seventeen witnesses presented live testimony at trial. The bulk of the trial testimony was devoted to Petitioner's merit evaluations from academic year 1984-85 to the time of trial. In accordance with the trial court's February 21, 1986 memorandum and order (Petitioner's App. G), evidence of acts which occurred outside of the Title VII 300-day filing period, and thus were time-barred, was permitted as background on the timely discrimination charges. As a result, testimony at trial dated back as far as twenty years. Despite the latitude given to Petitioner, the trial court held that he failed to prove intentional discrimination on the basis of his religion and/or national origin and that his reprimand was not in retaliation for the exercise of his Title VII rights. The United States Court of Appeals for the Sixth Circuit affirmed the opinion of the United States District Court for the Northern District of Ohio in all respects. For the reasons which follow, the Petition for Writ of Certiorari must be denied.

REASONS WHY THE PETITION SEEKING DISCRETIONARY REVIEW SHOULD BE DENIED

Most of the issues which Petitioner attempts to frame in his Petition were given little or no attention in briefings below. They raise no new and important federal questions; they are in no way related to matters about which there is conflict among the circuits; and they do not reflect a conflict between the lower courts' decisions and the decisions of this Court. Petitioner asserts only that the decisions below depart from precedents of this Court and the Sixth Circuit. He does not assert that the decisions below misstate the law, but only that they misapply the law to the facts of this case.

Nor does Petitioner offer any explanation of why the issues presented here are important enough to warrant review by this Court. They are not. The issues will not affect the outcome in this case; are bound to the particular facts of this case; pertain to a settled procedural matter within the discretion of the trial court; and involve a factual determination of two lower courts. They do not provide any basis for this Court to exercise its powers of supervision.

I. THE DENIAL BY THE DISTRICT COURT AND THE AFFIRMANCE BY THE SIXTH CIRCUIT OF PETITIONER'S FIRST MOTION FOR LEAVE TO AMEND COMPLAINT PROVIDE NO BASIS FOR REVIEW BY THIS COURT.

The primary focus of Petitioner's arguments in support of his Petition is his assertion that the district court erred in denying his first motion for leave to amend his complaint whereby he sought to frame his cause of action in terms of 42 U.S.C. §1983 instead of under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Four of the five Questions Presented by the Petitioner are related to the district court's memorandum and order of August 5, 1987. (Petitioner's brief at App. F.)

Petitioner's attempt to frame the district court's August 5, 1987 decision and the Sixth Circuit's affirmance as a suitable vehicle for review by this Court must be characterized as nothing short of frivolous. Professor Al-Marayati's private view that he has been unfairly treated has been rejected by the two lower courts. His continued pursuit of grievances against his employer and his colleagues by petitioning this Court is an act of egotism which can only serve to harass the Respondents.[1] While the matters raised in his Petition

[1] Petitioner's campaign of harassment continues in other courts. He is presently pursuing litigation in the Ohio Court of Claims against another department chairman, alleging that he was libeled, in *Abid A. Al-Marayati v. The University of Toledo,* Case No. 89-12569 (Ohio Ct. Claims), and in the United States District Court for the Northern District of Ohio against the University where, in his third amended complaint, Petitioner alleged discrimination under Title VII on the basis of his national origin and religion, and retaliation. *Abid A. Al-Marayati v. The University of Toledo, et al.,* Case No. 3:89CV7132 (N.D. Ohio).

are undoubtedly important to Professor Al-Marayati personally, he has raised and preserved no issues that are of public interest.

It is well-settled that the granting or denying of leave to amend a pleading is a procedural matter within the discretion of the trial court. *See* Fed. R. Civ. P. 15(a). Both the district court and the Sixth Circuit recognized that a trial court may deny a motion for leave to amend if such denial is based upon valid grounds. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77, *reh. denied*, 401 U.S. 1015, 91 S. Ct. 1247, 28 L. Ed. 2d 552 (1971). The trial court's determination to deny leave to amend is subject to limited appellate review for abuse of discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc., supra*; *Marx v. Centran Corp.*, 747 F.2d 1536 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125, 105 S. Ct. 2656, 86 L. Ed. 2d 273 (1985). The Sixth Circuit found that the trial court had not abused its discretion in denying Petitioner's first motion for leave to amend. (Petitioner's App. A13.)

Petitioner filed his first motion for leave to amend the complaint (hereinafter referred to as "the Section 1983 complaint" or "the proposed amended complaint") shortly after new counsel appeared on his behalf in the district court. In his memorandum in support of the motion to amend, he argued primarily that the court should allow him to amend his complaint because he had new counsel.[2]

By way of the proposed amended complaint, Petitioner sought to substitute Section 1983 for Title VII as his statutory basis. (Petitioner's App. A61-65, A66-71.) The

[2] Petitioner devoted approximately one and one-half pages in his initial appellate brief and one page in his lengthy reply brief before the Sixth Circuit of Appeals to the question of whether the district court had erred in denying him leave to amend.

same actions described in the first complaint as Title VII violations were characterized as violations of Petitioner's rights under 42 U.S.C. §1983.[3] The only new factual allegation was an allusion to an incident in which he found a Baghdad weather report on his mail box with a comment penned by the department chairman that was allegedly an "implicit" violation of Petitioner's first amendment rights. The proposed amended complaint did not state when this action occurred; however, the district court found in its August 5, 1987 order that the incident occurred no later than 1982 and was thus time-barred under the then-in-effect Section 1983 one-year statute of limitations. This one new factual addition would have been time-barred, even using the two-year statute of limitations which the Sixth Circuit recently found applicable in Section 1983 actions.

Petitioner additionally sought to name all Respondents in their individual and official capacities, whereas in the original complaint he had named only Professors Vezner and Doerner in their individual capacities. Finally, Petitioner sought to add a jury demand and to predicate his prayer for attorney's fees upon 42 U.S.C. §1988 instead of upon the applicable section of Title VII.

Respondents, in their memorandum in opposition to Petitioner's motion for leave to amend, discussed in some detail the various parts of the complaint that would be subject to a renewed motion to dismiss. Respondents pointed out that many, if not most, of the allegations, including the Baghdad weather report incident, were

[3] The Section 1983 complaint was, in fact, simply a "cutting and pasting" of the parts of the original complaint. Moreover, all of the acts alleged in the original complaint, and found by the Court in its February 21, 1986 order to be time-barred, were realleged in the proposed amended complaint.

time-barred by the one-year statute of limitations applicable to actions under 42 U.S.C. §1983. *See Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174, 106 S. Ct. 2902, 90 L. Ed. 2d 988, *reh. denied*, 478 U.S. 1031, 107 S. Ct. 12, 92 L. Ed. 2d 767 (1986). Respondents maintained that Petitioner's allegations were insufficient to raise an issue of First Amendment proportion. Respondents also pointed out that the Eleventh Amendment barred a Section 1983 action insofar as it sought money damages against the State of Ohio and state officials in their official capacity. The Respondents questioned the good faith of Petitioner in attempting to recast his complaint more than two years after the original complaint had been filed and extensive discovery had been done. The Respondents stated, and Petitioner has *nowhere* denied, that Petitioner was not entitled to a jury trial, having long since waived that right. *See* Fed. R. Civ. P. 39(b); *Baker v. City of Detroit*, 458 F. Supp. 379, 381 (E.D. Mich. 1978), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878, *reh. en banc denied and vacated and remanded in part on other grounds*, 712 F.2d 222 (6th Cir. 1983).[4]

Petitioner has, in seeking the review of this Court, *ignored* the severe flaws which the district court noted in the proposed amended complaint. The district court in its August 5, 1987 order set forth a number of grounds for its denial: most of the factual allegations (including the one new one) were time-barred; the University and individual defendants *in their official capacities* were immune from suit. Looking at a severely flawed pleading

[4] Petitioner did nothing in response to Respondents' memorandum discussing the above summarized flaws; he did not file a reply brief suggesting that Respondents' statement of the law was incorrect; he did not submit, as he might have, a revised amended complaint which was less flawed.

which would be subject to a renewed motion to dismiss, the court exercised its discretion and denied leave to amend.

Petitioner now focuses on two aspects of the Section 1983 complaint whose filing the district court denied and which denial the Sixth Circuit upheld. He suggests that both courts below have misunderstood and/or misapplied the applicable law. Petitioner asks this Court to review, *inter alia*, the question of whether University officials can be sued in their individual capacities under 42 U.S.C. §1983 (first Question Presented by Petitioner) and whether a state university and university officials acting in their official capacities are subject to suit for injunctive relief, as opposed to monetary damages, despite the bar of the Eleventh Amendment to suits for monetary damages (Petitioner's third Question Presented). Obviously, it is well-settled law that state actors can be sued in their individual capacity in Section 1983 actions and that a court may award prospective injunctive relief against a State. Only by seriously misreading the thrust of the opinions below can Petitioner suggest that the lower courts misunderstood or misapplied these settled principles.

Petitioner suggests in his first Question Presented that the lower courts abused their discretion in not granting him leave to amend to name the University officials in their individual capacities. The district court did not hold, and obviously therefore the Sixth Circuit did not erroneously uphold, that the individual Respondents were immune from suits in their individual capacities. Of course, in a Section 1983 action, the individual Respondents would have been entitled to good faith immunity, and it is clear from the findings of facts and conclusions of law that, had the case been tried as a

Section 1983 action, the district court would have found the individual Respondents entitled to qualified immunity.[5] Thus, even had the matter gone forward against the individual Respondents in their individual capacities, Petitioner would not have prevailed. The district court, after allowing into evidence *everything* that Petitioner offered over the 20 year period of his employment at The University of Toledo, found no basis that any individual Respondent behaved other than in good faith.

In his third Question Presented, Petitioner suggested that the trial court abused its discretion by not allowing him to recast the complaint to seek prospective injunctive relief against the University and its officials. The trial court did not hold, and therefore the Court of Appeals did not erroneously affirm, that a plaintiff in a Section 1983 action may not seek prospective injunctive relief against a state university and university officials in their official capacity. There is no basis for suggesting that either of the courts below made such a determination. Had Petitioner been entitled to injunctive relief, the court had the power to issue the suitable injunctive orders with the case styled as a Title VII action. The court, having heard Petitioner's evidence of alleged slights over a twenty year period, found that Petitioner was entitled to no relief.

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[5] The district court found no discriminatory animus in the incidents involving the relationship between the Petitioner and Respondent Doerner. (Petitioner's App. A20 at Finding of Fact ¶13.) The district court found that the Petitioner's salary determinations were made in accordance with the elaborate procedural safeguards set forth in the University's Manual of Policies and Procedures. (*Id.* at ¶25.) The court found that other faculty members had been censured, reprimanded and/or fired. (*Id.* at ¶33.) The court found that, while department members were not always congenial and were competitive among themselves, department rivalry was not motivated by discriminatory reasons. (*Id.* at ¶34.)

Petitioner maintains that the Sixth Circuit's reliance on *Will v. Michigan Dept. of State Police*, _____ U.S. _____, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), in support of its finding of no abuse of discretion shows that the Sixth Circuit overlooked district court errors. This is not a fair reading of the opinion. The Sixth Circuit obviously cited *Will* to show the viability of the line of cases that the district court had relied upon in holding that The University of Toledo is the alter ego of the State of Ohio and therefore is entitled to Eleventh Amendment immunity. *Hall v. Medical College of Ohio*, 472 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113, 83 L. Ed. 2d 789, 105 S. Ct. 796 (1985), had so held as to another state university in Ohio. In *Will*, *supra*, this Court discussed the Eleventh Amendment bar to suits against the States. In light of *Will*, the Sixth Circuit's holding in *Hall* is clearly correct. State universities in Ohio are entitled to Eleventh Amendment immunity. In short, Petitioner's first and third Questions Presented raise no issue worthy of this Court's review.

Petitioner suggests in his fourth Question Presented that the State of Ohio has waived sovereign immunity and consented to suit in the federal courts for a violation of Section 1983. Petitioner notes that the Sixth Circuit did not consider this issue; however, he did not raise the issue and, therefore, it was not properly preserved. In any case, via Ohio Rev. Code Section 4112.01 *et seq.*, the State of Ohio has not waived its sovereign immunity and consented to suit in the federal courts under Section 1983. A state's waiver of sovereign immunity must be clear and will not be lightly inferred. A state may consent to suit only in its own courts, which does not constitute a waiver of immunity from suit in federal court. *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S. Ct. 1347, 39 L. Ed. 2d 622 (1974). While the State of Ohio

has waived sovereign immunity and consented to be sued in the Ohio Court of Claims, it has not consented to suit in federal court. *Ohio v. Madeline Marie Nursing Homes #1 and #2*, 694 F.2d 449 (6th Cir. 1982). Petitioner's fourth Question Presented is meritless.

Petitioner's second Question Presented concerns the proper statute of limitations for actions under Section 1983. At no time in the courts below did the parties address the issue of whether the proper statute of limitations under Section 1983 should, in a case arising in Ohio, be four years rather than the two-year statute determined by the Sixth Circuit to be applicable in its *en banc* decision in *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989). Moreover, Petitioner's argument on this point misrepresents the holdings of the lower courts. He contends that "both courts below held that claims pursuant to 42 U.S.C. Section 1983 could not be presented if they were beyond the 300 day time bar previously applied by the District Court." (Petition at p. 10.) The district court denied leave to amend for several reasons, including the fact that the only additional fact alleged in the proposed amended complaint was time-barred, *not* by the 300-day limit of Title VII, but by the one year statute of limitations then in effect for Ohio-based Section 1983 actions. *Mulligan v. Hazard*, 772 F.2d 340 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174, 106 S. Ct. 2902, 90 L. Ed. 2d 988, *reh. denied*, 478 U.S. 1031, 107 S. Ct. 12, 92 L. Ed. 2d 767 (1986). (Petitioner's App. A51-A52.)

Petitioner contends that this ruling should be reconsidered in light of this Court's holding in *Owens v. Okure*, 488 U.S. _____, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989), and that the Sixth Circuit has improperly applied Ohio Rev. Code Section 2305.10, rather than

Ohio Rev. Code Section 2305.09, as the statute of limitations for Section 1983 actions. Even were the district court's holding reviewed in light of *Owens v. Okure*, this would not avail Petitioner. The Sixth Circuit has properly applied Ohio Rev. Code Section 2305.10, and its two year statute of limitations would still bar the only additional factual allegation in the proposed amended complaint, which occurred no later than 1982. (Petitioner's App. A50.) Ohio Rev. Code Section 2305.09, which Petitioner contends is the proper statute of limitations, is actually a general residual or "catch-all" statute of limitations. This Court rejected the use of such statutes in *Wilson v. Garcia*, 471 U.S. 261, 278, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985), and in *Owens v. Okure, supra*. Ohio Rev. Code Section 2305.10 is the residual *personal injury* statute of limitations, the use of which is prescribed by *Owens v. Okure, supra*.

Clearly, Ohio Rev. Code Secton 2305.10, covering "bodily injury," is the proper statute of limitations for Section 1983 claims. Thus, the Sixth Circuit's decision in *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989), is correct, and Petitioner's additional factual allegation would still be barred by the two year statute of limitations, since the original complaint was filed in 1985 and the additional incident occurred no later than 1982. In any case, this action would be a most inappropriate vehicle for reexamination of the *Browning* decision because the issue was not briefed in the courts below.

II. THE CONCLUSION OF THE DISTRICT COURT THAT PETITIONER'S REPRIMAND WAS NOT RETALIATORY AND THE SIXTH CIRCUIT'S AFFIRMANCE PROVIDE NO BASIS FOR REVIEW BY THIS COURT.

Petitioner's final Question Presented, which expressly seeks review of the purely factual determination of the two lower courts that the reprimand was not retaliatory, is not worthy of any lengthy discussion. Petitioner does not dispute the extensive testimony presented at trial as to the limitations that were placed upon him because of his history of continually raising old grievances previously found meritless by University grievance bodies comprised of his peers. Nor does Petitioner dispute that, prior to the issuance of the reprimand, he had been warned against continued disruptive behavior by Driscoll, University committees and his department. The only two arguments Petitioner was able to fashion in the face of the extensive trial testimony—that his memorandum regarding Professor Doerner was "a protected expression of concern" and his reprimand was 'inherently retaliatory"—were rejected by both lower courts. The district court held that "the letters of reprimand . . . were the result of Petitioner's refusal to follow the guidelines and University procedure and not because Petitioner was utilizing Title VII procedures." (App. A25 at ¶37.) The Sixth Circuit, noting the "substantial evidence in the record of Al-Marayati's conduct," concluded that the trial court did not err in its decision that the adverse employment decisions were not retaliatory. (App. A10.) The "exceptional circumstances" required before this Court will review a factual determination are not present and the Petition is not reviewable on this basis. *See, e.g., NCAA v. Board of Regents,* 468 U.S. 85, 98 & n.15, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984).

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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